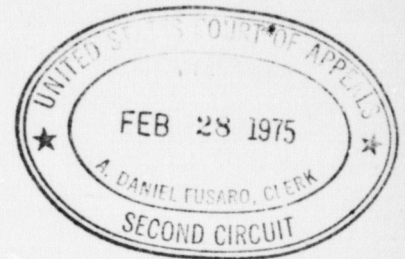


***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



IN THE MATTER OF THE APPLICATION
OF

NICHOLAS M. RINALDO

For a Writ of Mandamus compelling the HONORABLE JOHN T. CURTIN, Chief Judge for the Western District of New York, to vacate an Order made by him on the 6th day of February, 1975, directing the sealing of Affidavits comprising the underlying applications for three certain search warrants; and for a Writ of Mandamus compelling the said Chief Judge Curtin to vacate an Order made by him on the 7th day of February, 1975, directing the impoundment, for a thirty-day period, of three bank accounts owned by the Petitioner Rinaldo.

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

PRELIMINARY STATEMENT

This is an application for a Writ of Mandamus directed to the Honorable John T. Curtin, Chief Judge of the United States District Court for the Western District of New York. By this Writ petitioner seeks the vacation of two related ex parte orders affecting the petitioner and relating to property owned by him.

On February 6, 1975, Chief Judge Curtin order that the affidavits upon which a United States Magistrate had issued three search warrants directed against petitioner and property owned by him, be sealed for a forty-five day period. This order contained a provision that it and the papers upon which it was granted also be sealed for such period.

On February 7, 1975, and subsequent to the execution of the aforesaid search warrants, Chief Judge Curtin issued a second ex parte order, wherein and whereby he enjoined three banking institutions in the City of Buffalo, from releasing to the petitioner, funds owned by him and on deposit in said banks. The Government's knowledge of the existence of the bank accounts came as a result of the seizure of three bank books during the execution of the aforesaid search warrants.

On February 11, 1975, petitioner made application below for an order breaking the seal on the application for the warrants which had authorized the search and seizure of his property. This application was, as stated therein, a prelude to an application to be made by petitioner pursuant to the authority of Rule 41e of the Federal Rules of Criminal Procedure, for an order returning the bank books and other seized property.

On the 22nd day of February, 1975, petitioner's application was denied by Chief Judge Curtin and by petition dated February 24, 1975, petitioner seeks relief in this Court by way of Writ of Mandamus.

QUESTIONS PRESENTED
IN THIS APPLICATION

1. Where a person has a statutory and constitutional right to attack the validity of a search warrant issued by a United States Magistrate, does the District Court have the power to deny him access to the documents from which the Magistrate determined probable cause, by the device of sealing such documents?

2. Does a Federal Court have jurisdiction to temporarily restrain or enjoin a third-party depository from paying out deposited funds on the order of the lawful owner thereof where no authority

exists for the granting of a permanent injunction or for the confiscation of such funds?

POINT I

PETITIONER HAVING A RIGHT TO LITIGATE
THE CONSTITUTIONALITY OF A PROPERTY
SEIZURE, MAY NOT BE DENIED ACCESS TO
THE DOCUMENTS WHICH PURPORTEDLY JUSTIFY
THE SAME.

It cannot be disputed that petitioner is a person aggrieved by the search and seizure accomplished pursuant to the three search warrants issued and directed against him on February 7, 1975. As such aggrieved person, petitioner is afforded a remedy under Rule 41e of the Federal Rules of Criminal Procedure. This remedy is two-pronged. It allows for suppression of illegally seized evidence and the return of illegally seized property.

The search and seizure complained of by petitioner, being pursuant to a warrant, depends for its legality upon the adequacy of the affidavits and other documents which form the underlying application therefor.

Thus, the ability of petitioner to establish his claim of illegality and to avail himself of the full protection of Rule 41e, depends upon his ability to examine the affidavits of the search warrant in question.

At the hearing below, Court and Counsel for the Government indicated that petitioner has no immediate right to invoke the aid of Rule 41e and, therefore, he is in no way presently entitled to examine the questioned affidavits. This opinion is apparently based upon the

erroneous assumption that a motion under Rule 41e cannot be made until after indictment. If this were a motion to suppress with no demand for the return of property, there may be some merit in the Government's contention, (but see In re Fried, 161 F. 2d 453, Cert. Dis. 332 U.S. 807). However, there can be no question that a motion for the return of the unlawfully seized property may be made at anytime after the seizure. As this Court stated in Perial Amusement Corp. v. Morse, 482 F. 2d 515, 522: "It is settled that the procedures prescribed by Rule 41 may be invoked prior to the filing of an indictment." See also Hunsucker v. Thinney, 497 F. 2d 29; where the Fifth Circuit stated: "A substantial body of precedent establishes that Federal District Courts have power to order the suppression or return of unlawfully seized property even though no indictment has been returned and thus no criminal prosecution is yet in existence." (p. 32)

Your petitioner further submits that the Court is without authority to seal the affidavits in question and that if such authority exists at all, it cannot exist against a person aggrieved by a search. Thus, the Court may have the power to seal the affidavits as against the general public or as against the press, but not as against the person who has the right to contest the legality of a search dependent upon the sufficiency of such affidavits.

To seal the application for a search warrant is contrary to the provisions of Rule 41g which requires the Federal Magistrate before whom the warrant is returned to file all papers connected therewith, with the Clerk of the District Court.

It is submitted that the Government cannot argue that the

Court below was lawfully exercising inherent power, by reason of the fact that there is no inherent power in the Court to thwart the enforcement of a constitutional right, and if the Court has the power to deny petitioner access to these documents for any period of time at all, it would appear to have the right to deny him access indefinitely.

It is interesting to note in this connection that the provisions regarding suppression of illegally seized electronic communications do authorize the Court to withhold access to affidavits used to obtain wiretap orders, for a limited period of time. See 18 U.S.C. 2515 et seq. However, the motion therein contemplated does not involve the return of property and is expressly limited to eavesdrop situations. Petitioner further submits that in the instant case the action of the Court in sealing the order by which he sealed the affidavits, completely frustrates the rights of petitioner since on the one hand the Government takes the position that the Court has discretionary power, and on the other hand takes the position that petitioner is without any right to question the exercise of such discretion.

POINT II

THE AUTHORITY TO RESTRAIN AN ACT
OR IMPOUND PROPERTY FOR A TEMPOR-
ARY PERIOD OF TIME CANNOT EXIST
INDEPENDENT OF AUTHORITY TO PER-
MANENTLY RESTRAIN AN ACT OR CON-
FISCATE PROPERTY.

By issuing the restraining orders of February 7, 1975, the Court has denied petitioner access to property owned by him for a minimum period of thirty days and has further made it impossible for him to effectively exercise any control or any dominion over that property for that minimum period of time.

Petitioner submits that there is no specific statutory authority which confers jurisdiction upon a District court or any Federal court to issue such orders in the instant circumstances.

In the application for the restraining order it was stated that the order was needed to preserve the status quo. While the use of a restraining order of a temporary nature is authorized in cases where the status quo may otherwise be disturbed, it is an essential condition precedent to the issuance of such order that the "status quo" is a material and necessary part of the particular legal proceeding involved. Here the Government by virtue of the criminal charges mentioned in the affidavit for the instant order, would have no authority to seize and confiscate the funds in question; therefore, restraining petitioner from access to such funds has nothing at all to do with the status quo of the Government's law suit. It is also to be noted that there is no statutory authority which would allow the Government in the instant case to intervene as a fiduciary or a trustee and, therefore, there is no reason to maintain any status quo in regard to such funds.

There being no authority to confiscate the bank accounts involved; there being no authority for the Government to intervene in the bank accounts involved; the Government has denied petitioner due process of law and effectively deprived him of use of his property in violation of the Fifth Amendment.

If the restraining orders of February 7, 1975, are allowed to stand, petitioner could be denied the use of his property without having a forum to complain in, since the Court below could conceivably grant

indefinite ex parte extensions.

Therefore, to adequately insure petitioner the due process to which he is entitled, the instant Writ must issue.

Respectfully submitted,

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